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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICHARD RAVANESH SINGH et al., Defendants and Appellants.	H042511 (Monterey County Super. Ct. Nos. SS131025A, SS130357A, SS140786A, SS141757A&B)

I. INTRODUCTION

Defendants Richard Ravanesh Singh and Jordan Luis Killens appeal following a jury trial in which Singh was convicted of two counts of first degree murder (Pen. Code, § 187, subd. (a))[1] and Killens was convicted of one count of first degree murder. As to both defendants, the jury found true lying-in-wait special circumstances (§ 190.2, subd. (a)(15)), and as to defendant Singh, the jury found true a multiple murder special circumstance (*id.*, subd. (a)(3)). As to each murder conviction, the jury also found true allegations under section 12022.53 that defendants personally and intentionally discharged a firearm and proximately caused great bodily injury or death. Both defendants were sentenced to life without the possibility of parole for the murders, with consecutive terms of 25 years to life pursuant to section 12022.53, subdivision (e).

[1] All further statutory references are to the Penal Code unless otherwise indicated.

On appeal, defendants claim the trial court made erroneous evidentiary rulings.[2] They claim multiple instances of prosecutorial misconduct. They also challenge the instruction on accomplice testimony (CALCRIM No. 334). Finally, in response to this court's supplemental briefing request, defendants claim and the Attorney General concedes that there were pleading and proof errors with respect to the section 12022.53, subdivision (e) enhancements as well as with respect to the section 12022.53, subdivision (d) enhancements, which were imposed but stayed. For reasons that we shall explain, we find no merit to defendants' challenges to their convictions. However, we agree the trial court must strike the section 12022.53, subdivisions (d) and (e) enhancements, and therefore we will reverse the judgment and remand for resentencing.[3]

II. BACKGROUND

The victims, Demetrius Safford and Navneal Singh,[4] were shot and killed on the night of August 11, 2013, on the side of Dunbarton Road in Aromas. Defendant Singh was convicted of both murders; defendant Killens was convicted of murdering only Safford. The prosecution presented the testimony of two eyewitnesses to the murders: Ronald Saxton and Eric Romero, both of who had gone to the scene of the murder with defendants, believing they were going to participate in a home invasion robbery.

A. Relationships

Romero, one of the eyewitnesses, had known defendants since elementary school, and he had known Saxton since high school. Saxton, the other eyewitness, had known defendant Killens, who was nicknamed "Liggz," since high school. Saxton had met

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[2] Defendant Killens expressly joins in the arguments made by defendant Singh.

[3] Defendants' appellate counsel have both filed petitions for writ of habeas corpus, which this court ordered considered with the appeal. We have disposed of the habeas petitions by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

[4] Because defendant Singh shares the same last name with one of the victims (Navneal Singh) and one of the witnesses (Reginald Singh), we use Navneal and Reginald's first names for clarity and not out of disrespect.

defendant Singh through defendant Killens a few months before the Navneal and Safford murders. Saxton and defendants would "hang out" and smoke marijuana together. Saxton was the only one of the four who had a car—a black Lincoln.

Victim Navneal lived in Sacramento. Reginald Singh, defendant Singh's brother, became friends with Navneal in 2010. Reginald introduced Navneal to defendant Singh. Defendant Singh referred to Navneal as "cousin," even though they were not actually related to each other.

On July 4, 2013, defendant Singh attended a birthday party for Reginald in Sacramento. Romero and Saxton also attended the party. Navneal attended a later party at a motel room with Reginald, defendant Singh, Romero, and Saxton.

B. The Shooting – Initial Witnesses

At about 9:47 p.m. on August 11, 2013, Yvonne Cortez and her husband, Luis Sanchez, were driving home on Dunbarton Road. They saw two cars parked on the side of the road and four people standing in between the cars. One car was a black Lincoln LS. One of the cars had its hood open, and the other car had its trunk open. Two men were facing the other two men.

A resident on Dunbarton Road heard 10 to 15 gunshots in rapid succession. Another area resident heard about five shots followed by three or four more shots. A third resident heard seven to nine shots.

At about 10:15 p.m., an off-duty deputy sheriff called 911 after seeing two bodies on the ground behind a car on Dunbarton Road. Another deputy was dispatched to the scene, where he saw the victims' bodies on the ground behind a gold Toyota sedan. The deputy observed bullet wounds to both victims' heads and bullet holes in the Toyota.

C. Investigation

A detective was also dispatched to investigate the shootings. He located four brass bullet casings at the scene. Another detective found two additional casings the next day. A cell phone was found in the Toyota.

Forensic evidence technician Victor Lurz processed the vehicle. There was evidence of four bullet strikes to the vehicle, likely made by three bullets. A bullet was found near the right rear panel, and another bullet was found inside the car trunk. About a year later, metal detectors were employed at the scene of the murder. Three more bullets were located at that time. The evidence—including a bullet found in Navneal's head and a fragment found in Safford's head—indicated that at least eight bullets had been fired.

An autopsy revealed that Safford had been shot in the back of the head. Bullet fragments were found in his skull. Safford had abrasions on his face that could have been caused by falling down and hitting his face on the ground. He also had a bullet wound in his back. The bullet had exited his chest. He had a third bullet wound in his right foot. A bullet had entered and exited one of Safford's shoes.

Navneal had been shot three times. He had an entrance wound in the back of his head, from which a bullet was extracted. A second bullet had entered his right lower back and had exited his abdomen. The condition of the exit wound indicated that Navneal had been pressing up against something or lying on the ground. A third bullet had entered the back of Navneal's leg just below the knee and exited his thigh.

Forensic scientist Adam Lutz analyzed five bullets from the murder. It was highly likely that all five bullets, which were all full metal jacketed bullets, were fired from the same gun. The bullets included one taken from Navneal's skull. Lutz also analyzed seven casings from the murder. He concluded it was likely that all of the casings came from the same gun as well. However, he could not rule out the possibility that there had been two guns because there was a potential eighth bullet strike.

Lutz had looked at the bullet fragments taken from Safford's skull. He described them as "very small lead fragments." It was possible, although "speculative," that the bullet fragments found in Safford's skull were from a different type of bullet—i.e., not a full metal jacket bullet. Lutz had not analyzed the bullet fragments with magnification or

"the appropriate lighting," however, so he could not "give an opinion on that particular issue."

Defendant Singh did not attend Navneal's funeral. Prior to the funeral, Reginald asked defendant Singh if he had heard about Navneal's murder. Defendant Singh said he had no idea. At the funeral, Reginald got into an argument with his ex-girlfriend, Komal Prasad, who had had an affair with Navneal. Reginald told Prasad that he knew what had happened to Navneal and "who did it," and he told her that Navneal had been with defendant Singh on the night of the murders.

D. Interview and Arrests of Defendant Singh

Defendant Singh was interviewed in late February 2014 at the Sheriff's Department. He received the *Miranda* warnings[5] and agreed to talk. When asked if he knew about Navneal's murder, defendant Singh said he had heard about it from his brother Reginald, a few days after it happened. Defendant Singh had also seen news reports about the murders. Defendant Singh referred to Navneal as his "cus" or cousin.

Defendant Singh acknowledged that Navneal and Stafford had given him a ride from Sacramento to Monterey on the day of their murders. Defendant Singh said he had been dropped off at a smoke shop on Lighthouse Avenue between 1:00 p.m. and 3:00 p.m., and that Navneal and Stafford had told him they were going to go back to Sacramento. Defendant Singh then met up with a friend and went to Lovers Point, where he and the friend smoked marijuana. Defendant could not name the friend or say whether the friend was male or female. Defendant Singh denied communicating with Navneal, through text messages or calls, after being dropped off.

Defendant Singh was arrested for the murders after his interview but was subsequently released due to insufficient evidence. He was arrested again in July 2014.

[5] *Miranda v. Arizona* (1966) 384 U.S. 436.

E. Cell Phone Evidence

Cell phone and cell tower records showed that defendant Singh and Navneal had communicated at about 12:15 p.m. on the day of the murders and that they had traveled from Sacramento to Monterey at around the same time that day.

At 7:23 p.m., defendant Singh's phone was in Marina. At 7:57 p.m., he called Navneal while in Seaside. He made additional calls from Seaside and then received calls from Navneal at 8:11 p.m. and 8:22 p.m. Subsequent calls to and from Navneal indicated that defendant Singh was moving north into Castroville and then east towards Salinas. Defendant Singh received a call from Navneal at 9:25 p.m., a call from Saxton at 9:33 p.m., and a call from Romero at 9:41 p.m. At 9:42 p.m., defendant Singh's phone made an outgoing call that went through a tower on Dunbarton Road. He also received a call that went through the Dunbarton Road tower at 9:45 p.m. At 10:08 p.m., defendant Singh made a call that went through the Dunbarton Road tower, but by 10:11 p.m., he was moving south. By 10:19 p.m., he was in Salinas, and at 10:34 p.m., he was in Marina.

Saxton called Romero at 7:18 p.m. on the day of the murders. Saxton's calls around that time were made from Seaside and Marina, as he was moving north. At 9:33 p.m., Saxton called defendant Singh from a location in Salinas.

Romero, too, was in the Seaside area at 7:18 p.m. on the day of the murders. Romero received several calls from defendant Singh between 8:00 p.m. and 8:14 p.m., while Romero was still in Seaside. Romero's phone made a call through a tower on Crazy Horse Canyon Road in Salinas at 9:41 p.m., and it received a call from a tower on Dunbarton Road in Aromas at 9:42 p.m. Romero's phone next made a call from Salinas at 10:25 p.m.

Between June 3, 2013 and August 11, 2013, defendant Singh and Navneal had made 166 calls to one another. After 10:15 p.m. on the day of the murders, there were no calls between them.

Defendant Singh got a new cell phone number three days after the murder. Saxton's last phone call to defendant Singh was on September 17, 2013.

Kayana Jackson was the girlfriend of defendant Killens in August 2013. In September 2013, defendant Killens sent Jackson a text message: "You mean a lot to me. But remember when I told you I did something and I wish I could tell you?" Jackson wrote back, asking what defendant Killens had done. Defendant Killens responded: "Something that might fuck up our relationship. All I'm saying is what I did, I could be in jail for life and you don't deserve that." Jackson asked defendant Killens to tell her what he had done, but Killens indicated he would not do so over the phone.

In text messages the following day, defendant Killens again indicated he might tell Jackson what he had done. He also indicated that it might be "too real" for Jackson to understand.

About a week later, defendant Killens told Jackson he had shot and killed someone. Defendant Killens showed Jackson a gun that was in his bedroom dresser. The gun was a semiautomatic, "silver grayish" and "palm size."

Jackson was interviewed by the police in August 2014. Jackson told the police that defendant Killens had not talked to her about the murders. Upon further questioning, Jackson admitted that defendant Killens had told her he had shot or killed someone.

F. Probation Search of Defendant Killens

On August 5, 2014, defendant Killens was under the supervision of the probation department with a search and seizure waiver. Probation officers conducted a search of his parents' home on that date. They examined defendant Killens's cell phone, including his text messages.

One outgoing text message to Jackson read, "I was taking a nap and my phone kept going off. They went to my granny's and said I had a warrant for the murder of two men. Delete these messages, all of them." Another outgoing message to Jackson read, "Na. That's stupid. All the freedom they're going to take from me. I'm staying out as

long as I can." In response, Jackson asked, "Are they trying to get you for 25 years to [life]?" Defendant Killens's reply said, "Maybe. I don't know. Up to the judge."

The probation officers also opened up Facebook on defendant Killens's cell phone. An October 10, 2013 Facebook post by defendant Killens said, "I only fucc with a few niggas and all of em shoot niggas." An October 14, 2013 post by defendant Killens read, "My nigga said I got to have weed to fucc with him." Defendant Killens had "tagged" defendant Singh in that post as well as another one, dated October 13, 2013, which linked to a YouTube video. Defendant Singh had also tagged defendant Killens in a Facebook post dated November 6, 2013, which said, "just stop it my nigga it aint coo lol." On December 11, 2013, defendant Killens had posted, "Ask [defendant Singh] he'll tell you everything you need to know when I go in. Lol." On June 16, 2014, defendant Killens had tagged defendant Singh in a video post, which said, "This finna be . . . fathers day …… aint nobody was trying to dance with her she was humping everything but a nigga…." Defendant Killens had also accessed a Facebook link regarding the murders.

An August 5, 2014 Facebook message from defendant Killens to a person named Tran read, "I know shits crazy." The reply read, "He got caught with the same struzy you had?" Defendant Killens responded, "Sum like that." Tran's response asked, "Is he gonna drop a dime on you? Ha ha. Just kidding." The reply message from defendant Killens stated, "He already did." Another outgoing message from defendant Killens read, "It's bad for me right now. I'm trying to get to Hawaii." Other outgoing Facebook messages indicated that defendant Killens was "going to try to slide" (meaning leave) and that he needed to get out of the country.

Defendant Killens's cell phone also contained news articles regarding the arrest of defendant Singh for the murders of Navneal and Safford. The probation officers confiscated the cell phone.

G. Saxton's Testimony

A detective located a black Lincoln LS at an apartment complex in Seaside on August 13, 2013. The Lincoln was registered to Ronald Saxton, who testified at trial under a grant of immunity.

A few weeks before the Navneal/Safford murders, Saxton was driving a car with defendant Singh. Saxton was arrested for possessing a gun, and he pleaded guilty, but at trial he claimed that the gun had actually belonged to defendant Singh.

On August 11, 2013, Saxton received a call from defendant Singh. Defendant Singh said he was coming down from Sacramento with his cousin and a friend. Saxton later exchanged text messages with defendant Singh, in which they discussed a plan to rob a house in Prunedale. Defendant Singh said a friend of his lived in the house and that there would be money and gold. Defendant Singh wanted Saxton to be the driver, and he wanted defendant Killens to come.

Saxton picked up defendants from the home of defendant Killens's grandmother. They then picked up Romero. While they were stopped for gas, defendant Killens said he had a gun and showed Saxton that he was carrying a gun, which appeared to be a revolver. Defendant Singh talked about meeting up with his cousin and a friend, who would be helping with the robbery. Defendant Singh said his cousin had a gun.

Defendant Singh directed Saxton to drive to Prunedale. They contacted a car that was stopped on a back road. Defendant Singh got out of Saxton's car and went inside the other car for a while, then returned to Saxton's car. Both cars then drove off, with Saxton's car in the lead and defendant Singh directing him where to go. On another back road, Saxton pulled the car over. The other car parked in front of him. Defendants and Romero exited Saxton's car, and two people—Navneal and Safford—got out of the other car.

Saxton watched the group talk and smoke cigarettes for a while. Romero then returned to Saxton's car. The others continued to talk. Navneal then took out a gun and passed it to defendant Singh.

After about 10 to 12 minutes, the group shook hands, and defendants walked back towards Saxton's car. Defendants then turned around and shot at Navneal and Safford, whose backs were turned. Navneal and Safford "dropped." Saxton heard about eight shots and believed that both defendants fired guns. Saxton described the gun that defendant Singh had used as a black gun with a big barrel—likely a .45-caliber.

After the shooting, defendants got back into Saxton's car. Defendant Singh told Saxton, "Go before I leave you here, too." Saxton drove defendants to Romero's neighborhood, where defendants and Romero got out of the car. The others instructed Saxton not to say anything.

Saxton stopped hanging out with defendant Singh after the murders, but he continued to have telephone contact with defendant Singh, in order to "keep it cool."

Saxton was arrested and interviewed four times about the murders. During the first three interviews, he did not tell the truth because he was scared of defendants. In the first interview, he denied having seen Navneal or Safford and denied having been to Dunbarton Road. In the second interview, he admitted having driven defendant Singh to Dunbarton Road, saying he had given him a ride to a party. After Saxton was arrested and booked for being an accessory to murder, he told the police he had given defendant Singh a ride to meet his cousin on Dunbarton Road, and he told the police that defendant Singh had shot two people. After the police told Saxton that Romero was in custody, Saxton admitted that Romero had been present. Saxton later acknowledged that he had also driven defendant Killens to the scene of the murders, but he told the police that only defendant Singh had shot the victims. At the time, defendant Killens was still out of custody. Eventually, after hearing that both defendants were in custody, Saxton gave

another statement, in which he told the truth: that both defendants had shot at the victims.

According to Monterey County Sheriff's Detective Martin Opseth, Saxton's first interview was on July 22, 2014. Saxton admitted knowing defendant Singh and Romero, and he admitted dropping defendant Singh off on Dunbarton Road, saying he believed defendant Singh was going to a party.

H. Romero's Testimony

Romero was in a witness relocation/protection program when he testified at trial.

On the day of the murders, Romero went to go hang out with defendants and Saxton. The other three picked Romero up, and at some point they met up with another car, which started following them. Both cars pulled over, and defendant Singh got into the other car. Both cars then began driving again, with defendant Singh giving Romero directions over the phone, which Romero relayed to Saxton, the driver. Both cars eventually pulled off on Dunbarton Road. Saxton parked behind the other car, and everyone exited the cars except Saxton. Romero realized he had met one of the men from the other car about a month earlier, in Sacramento.

Romero, defendants, and the victims stood in a circle, smoking, outside of the cars. Defendants and the victims discussed plans for a home invasion robbery. Safford then pulled out a gun—a black semiautomatic, showed it to the others, and handed it to defendant Singh. Defendant Singh checked the clip for bullets, then cocked the gun. Defendant Killens then pulled out a silver revolver and showed it to everyone. At that point, Romero returned to Saxton's car.

Romero saw defendants shake hands with the victims as if they were saying goodbye. The victims then began walking towards their car. Defendants then pulled out guns and shot the victims. The victims both "dropped," and defendants returned to Saxton's car.

Defendant Singh came back to Romero's house after the murders. Defendant Singh left after five or ten minutes, but returned later to spend the night. When defendant Singh returned, he no longer had the gun, but he had a "lump sum of money."

Romero continued to have contact with defendant Singh following the murders but slowly disassociated with him. Romero had heard defendants "plotting on" Saxton after Saxton had "cut [them] off," and he was scared. Romero acknowledged, however, that he was with defendant Singh in March of 2014 when the police stopped a car in which they were riding. Romero was in possession of ecstasy and heroin at the time, leading to drug possession charges.

Romero was interviewed twice by the police. During his first interview, on July 31, 2014, Romero told the police that he and Saxton had picked up defendant Singh from Dunbarton Road. Romero denied being present during the murders or bringing defendant Singh to the site, and he denied knowing the victims. Romero did not name defendant Killens: he was scared of defendant Killens, who was still out of custody.

During his second interview, on August 8, 2014, Romero named both defendants. Defendant Killens was not in custody yet; he was arrested three days later. No promises were made to Romero, but Detective Opseth did say he would try to help Romero by talking to the District Attorney about his pending cases. At the time, Romero had pending charges involving possession of stolen property and possession for sale of narcotics. The charges were dismissed after Romero testified at the preliminary hearing.

At trial, Romero admitted that some of his testimony at the preliminary hearing had not been "the full truth." He had "misremembered." For instance, he had previously testified that the group went to Salinas before going to Dunbarton Road, but he was no longer sure that was accurate.

I. Defense Witnesses

Defendant Killens's mother testified that defendant Killens lived with her and his grandmother in Seaside during August 2013. They moved to another Seaside residence in October 2013.

Shannon Langley was close friends with Safford and was living with him in August 2013. On August 11, 2013, Safford left the house, then came back with Navneal. Safford took his .45-caliber gun with him when he and Navneal later drove away.

J. Charges, Verdicts, and Sentencing

Defendants were both charged with two counts of first degree murder (§ 187, subd. (a)). The second amended information alleged lying-in-wait special circumstances (§ 190.2, subd. (a)(15)) and multiple murders special circumstances (*id.*, subd. (a)(3)), and it alleged that each defendant had personally used and intentionally discharged a firearm and proximately caused great bodily injury or death, with references to section 12022.53, subdivisions (b), (c), (d), and (e).

Defendant Singh was convicted of both murders, but Killens was convicted only of the Safford murder. The special circumstance allegations as to each murder conviction were found true. The verdict forms reflected that the jury found true allegations that each defendant personally and intentionally discharged a firearm under section 12022.53, subdivision (c) and allegations that each defendant personally and intentionally discharged a firearm, causing great bodily injury and death, "within the meaning of Penal Code Sections 12022.53(d) and 12022.53(e)." Both defendants were sentenced to life without the possibility of parole for the murders with consecutive terms of 25 years to life for the section 12022.53, subdivision (e) allegations. The trial court imposed terms of 20 years for the section 12022.53, subdivision (c) allegations and terms of 25 years to life for the section 12022.53, subdivision (d) allegations, but stayed those terms.

III. DISCUSSION

A. Admission of Facebook Posts by Defendant Killens

Defendants contend the trial court erred by allowing the prosecution to introduce the following six Facebook posts: (1) the October 10, 2013 post in which defendant Killens stated, "I only fucc with a few niggas and all of em shoot niggas;" (2) the October 14, 2013 post in which defendant Killens had "tagged" defendant Singh and stated, "My nigga said I got to have weed to fucc with him;" (3) the October 13, 2013 post that again tagged defendant Singh and linked to a YouTube video; (4) defendant Singh's post dated November 6, 2013, in which he had tagged defendant Killens and written, "just stop it my nigga it aint coo lol;" (5) the December 11, 2013 post by defendant Killens stating, "Ask [defendant Singh] he'll tell you everything you need to know when I go in. Lol;" and (6) the June 16, 2014 post in which defendant Killens had tagged defendant Singh in a video and stated, "This finna be . . . fathers day …… aint nobody was trying to dance with her she was humping everything but a nigga…."

1. Proceedings Below

In limine, the prosecution moved to admit two of defendant Killens's Facebook posts to show the close friendship between defendants. The two posts included the October 14, 2013 post in which defendant Killens had "tagged" defendant Singh and referenced "weed," and the October 13, 2013 post in which defendant Killens again tagged defendant Singh and linked to a You Tube video.

Defendant Killens moved to exclude all Facebook posts. He argued that the potential prejudice of the posts would substantially outweigh "any minimal probative value."

At the hearing on the motion, the prosecutor indicated he was seeking to introduce additional Facebook posts. He again argued that the posts were relevant because they showed defendants' association with one another. Defendant Killens asserted that some

of the posts were actually rap lyrics from a group called Niggas and argued that the posts had no probative value.

The trial court found that the October 10, 2013 Facebook post referencing shooting was "relevant and admissible," noting that the post was made "close enough in time to the shootings" to show defendant Killens's state of mind. The trial court found that the October 13, 2013 post in which defendant Singh was "tagged" also showed the relationship between defendants; the court also found that the post's reference to "weed" was not "offensive" and did not imply that defendants were engaged in drug sales. The trial court likewise found that defendant Singh's November 6, 2013 post (tagging defendant Killens) and defendant Killens's December 11, 2013 and June 16, 2014 posts (referencing and tagging defendant Singh) were relevant to show defendants' association.

2. Applicable Law

Evidence Code section 1101, subdivision (a) provides: "Except as provided in this section and in Sections . . . 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

Evidence Code section 1101, subdivision (b) provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its

admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence." (*People v. Waidla* (2000) 22 Cal.4th 690, 723 (*Waidla*).)

3. Analysis

Defendant Killens contends the Facebook posts amounted to bad character evidence and thus should have been excluded pursuant to Evidence Code sections 1101 and 352. He concedes the Facebook posts were "arguably relevant" to show defendants' association with each other, but he contends the posts were cumulative of other evidence. Defendant Killens asserts that the posts contained irrelevant "offensive and inflammatory language" that painted defendants as "gun[-]toting drug dealers or users, who denigrated women." Defendant Killens contends the trial court's error in admitting the Facebook posts amounted to a violation of his federal constitutional rights to due process and a fair trial.

Defendant Singh contends the meaning of the Facebook posts was "too uncertain to be admissible" and that the posts invited the jury to speculate about their meaning. He contends that one post in particular suggested that defendant Singh knew something about the murders: the December 11, 2013 post by defendant Killens stating, "Ask [defendant Singh] he'll tell you everything you need to know when I go in. Lol."

As an initial matter, we reject defendant Killens's argument that the Facebook posts were inadmissible under Evidence Code section 1101, subdivision (a). The Facebook posts were explicitly offered to show the association between defendants. The posts were not "offered to prove [defendants'] conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) Moreover, none of the Facebook posts resulted in the introduction of evidence of prior bad conduct, which is inadmissible to prove criminal disposition under Evidence Code section 1101, subdivision (a). Although Killens

referenced other people "shoot[ing] niggas" and referred to "weed," Killens did not indicate that he had ever shot someone or that he had ever used "weed." Thus, "[t]he prohibition on the use of 'other crimes' evidence to prove character is not implicated here." (See *People v. Smith* (2015) 61 Cal.4th 18, 48.)

The Facebook posts were also not inadmissible simply because other evidence presented at trial ultimately helped establish the association between defendants. (See *People v. Heard* (2003) 31 Cal.4th 946, 975 [" 'it is immaterial for purposes of determining the relevance of evidence that other evidence may establish the same point' "]; see also *People v. Lang* (1989) 49 Cal.3d 991, 1015 [when ruling on a motion in limine, trial court relies on the parties' representations regarding what issues will be disputed], abrogated on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.) As the Attorney General points out, the other evidence establishing defendants' association came primarily from Saxton and Romero, whose testimony was attacked by defendants as unreliable. Thus, the Facebook posts had substantial probative value.

The trial court reasonably found the risk of undue prejudice from the Facebook posts did not substantially outweigh the posts' probative value under Evidence Code section 352. "Evidence is substantially more prejudicial than probative [citation] if . . . it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*Waidla, supra,* 22 Cal.4th at p. 724.) " 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.' " (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Although the Facebook posts contained the terms "nigga" and "fucc," our Supreme Court has observed that "[j]urors today are not likely to be shocked by offensive language." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1009.) Likewise, in light of the California electorate's legalization of marijuana for both medical and recreational purposes, the references to "weed" were not

likely to inflame the jury. (See Prop. 215, as approved by voters, Gen. Elec. (Nov. 5, 1996); Prop. 64, as approved by voters, Gen. Elec. (Nov. 8, 2016).)

Finally, we do not agree with defendant Singh's claim that the Facebook posts should have been excluded because the jury might have speculated about their meaning and found that the December 11, 2013 post suggested defendant Singh knew something about the murders. Nothing in the posts provided a basis for the jury to find that they constituted admissions or accusations of guilt. The December 11, 2013 post by defendant Killens was several months after the shooting and many months before the probation search that led to Killens's arrest.

We conclude the trial court did not abuse its discretion by admitting the Facebook posts.

B. Admission of Facebook Messages Between Killens and Tran

Defendant Singh challenges the admission of the messages exchanged via Facebook between defendant Killens and Tran.[6] As noted above, the messages were exchanged on August 5, 2014, shortly after the arrest of defendant Singh in July 2014. The messages referenced "shit[]" being "crazy," someone getting "caught with the same struzy you had," the fact that someone had "drop[ped] a dime" on defendant Killens, and the fact that Killens was trying to get to Hawaii or out of the country because things were "bad" for him.

Defendant Singh contends these messages falsely suggested that defendant Singh had implicated himself and defendant Killens. He argues the messages were inadmissible hearsay and that their admission violated his Fourteenth Amendment right to due process and a fair trial.

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[6] Tran was identified by his full name, Clinton Tran, in the prosecution's in limine motion, where he was described as an "unknown person named 'Clinton Tran.' " At trial, Tran was referred to as "a person by the name of Tran."

1. Proceedings Below

The prosecution's motions in limine included a motion to admit the text messages and Facebook messages found on defendant Killens's cell phone during the probation search, which included the messages he had exchanged with his girlfriend, Jackson, and Tran. In addition to the Facebook messages that were admitted at trial, the prosecution originally sought to introduce four messages that preceded those admitted at trial. The messages began with one from Tran to defendant Killens: "has he called u back, & your boy rich in tha news." The next message was from defendant Killens to Tran: "Oh yup." Defendant Killens also wrote, "[S]end me the link." Tran responded, "they caught him on the 2 murders or some shit."

Both defendants objected to admission of all the Facebook messages between defendant Killens and Tran. Defendant Killens filed a motion in limine to exclude all data obtained from his Facebook account. Defendant Singh objected to the admission of any statements by defendant Killens on the grounds that such statements were hearsay as to him and that their admission would constitute a confrontation clause violation unless defendant Killens and Tran testified.

The prosecutor argued that the messages from Tran were not being offered for their truth but rather to give context to defendant Killens's messages. The prosecutor subsequently told the trial court he was no longer seeking to introduce the first four messages because they were from "another person," not Tran.

The trial court found that admission of the Facebook messages would not violate defendant Singh's confrontation clause rights under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) or *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*) and *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*).[7] The trial court further found that the

[7] Although defendant Singh briefly discusses *Crawford, Bruton,* and *Aranda* in his briefs, he does not make a confrontation clause argument on appeal.

messages were admissible under the hearsay exceptions for adoptive admissions and declarations against interest. The trial court found that the statements were reliable in light of the "surrounding circumstances," which included the fact they were made close to the time of defendant Singh's arrest.

During the jury instruction conference, counsel for defendant Singh requested the trial court preclude the prosecutor from arguing that defendant Singh "did drop a dime on somebody." The prosecutor indicated he would not make such an argument. The prosecutor thereafter told the jury that "drop a dime" meant snitching, that a "struzy" was a gun, and that the "drop a dime" message was a reference to defendant Singh.

2. Applicable Law

The hearsay exception for adoptive admissions is set forth in Evidence Code section 1221, which provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

The hearsay exception for declarations again interest is set forth in Evidence Code section 1230, which provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

" 'The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is

sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 584 (*Geier*).) Thus, " '[e]ven when a hearsay statement runs generally against the declarant's penal interest . . . , the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission.' " (*Ibid*.) " '[I]n this context, assessing trustworthiness " 'requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.' " ' [Citation.]" (*Ibid.*)

3. Analysis

Defendant Singh first argues that the Killens/Tran Facebook messages were not admissible once the prosecution indicated it would not be introducing the first four messages, which referenced defendant Singh being "in tha news" and having been "caught . . . on the 2 murders." Defendant Singh argues that without the first four messages, the remaining messages could not have any meaning that was relevant to disputed issues at trial. However, the jury could rationally have inferred that the messages referenced defendant Singh's arrest for the murders. The jury knew that defendant Singh had been rearrested for the murders in July 2014 and that the messages were exchanged shortly thereafter, on August 5, 2014. Thus, the jury could rationally infer that the references to someone being caught with a "struzy" (or "streezy") and someone having "drop[ped] a dime" on defendant Killens were references to defendant Singh.

Defendant Singh next argues that the Facebook messages should not have been admitted because the jury would not have been aware of the meaning of the word "streezy" (or "struzy") or the phrase "drop a dime." However, defendant Singh did not object on this ground below, thereby forfeiting this claim on appeal. (See *People v.*

Lindberg (2008) 45 Cal.4th 1, 48 [defendant "failed to object specifically on the ground he now advances and thereby deprived the trial court of an opportunity to make a fully informed ruling on the issue"].) In fact, the trial court appeared to believe it was common knowledge that "drop a dime" meant "to implicate," and defendant Singh's trial counsel explicitly argued that the jury would understand that "struzy" meant a gun and that "drop a dime" meant "snitched."

Defendant Singh next argues that the prosecution failed to meet the requirements of the declaration against interest exception because there was no showing that Tran was unavailable. However, the record is clear that Tran's messages were admitted as adoptive admissions by defendant Killens, not as declarations against interest.

Defendant Singh also argues that the adoptive admissions exception did not apply to Tran's messages, because Tran indicated he was "just kidding" when he asked, "Is he gonna drop a dime on you?" However, the relevant consideration here is whether defendant Killens, "by words or other conduct," adopted Tran's statements. (Evid. Code, § 1221.) Even if Tran was "kidding," the trial court reasonably found that defendant Killens's response—"He already did"—was an adoption of the truth of Tran's statement.

Defendant Singh also points out that there was no evidence at trial showing that defendant Singh in fact implicated (i.e., "drop[ped] a dime on") defendant Killens. He contends the trial court therefore erred in finding that the statement was reliable. As a reviewing court, we generally " 'focus[] on the ruling itself and the record on which it was made,' " not on " 'subsequent matters.' " (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 822-823 & fn. 1 (*Hill*).) Moreover, the trial court did not need evidence that defendant Singh did implicate defendant Killens in order to find that the Facebook messages were reliable. The trial court needed to find only that the statements were trustworthy in light of " 'the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.]" (*Geier, supra*, 41 Cal.4th

at p. 584.) Here, the statements were made in a private communication, close in time to defendant Singh's arrest. Taken together, the statements showed defendant Killens was admitting culpability in the crimes for which defendant Singh had been arrested. On this record, the trial court reasonably found that the statements were reliable.

Defendant Singh next contends that the Facebook messages constituted inadmissible bad character evidence because the jury might have inferred that the messages referred to another gun incident. We do not agree that this was a reasonable inference. As already pointed out, the message exchange occurred close in time to defendant Singh's arrest for the Navneal and Singh murders. Moreover, the prosecutor argued that the Facebook messages referenced defendant Singh. There was no basis upon which the jury could have found that the messages referenced a separate crime or bad act.

Defendant Singh's final argument concerning the Facebook messages is that their admission violated due process because the prosecutor used the messages to misrepresent facts—i.e., to lead the jury believe that defendant Singh had implicated himself in the murders. However, the prosecutor never argued that defendant Singh confessed or implicated Killens. Moreover, at most the Facebook messages suggested that defendant Singh did implicate defendant Killens; they did not suggest that defendant Singh had implicated himself in the murders.

In sum, the trial court did not abuse its discretion by admitting the Facebook messages exchanged by defendant Killens and Tran.

C. Restriction on Cross-Examination of Romero

Defendant Killens contends the trial court erred by restricting his cross-examination of Romero—specifically, by not allowing defendant Killens to elicit evidence that defendant Singh had a gun during the vehicle stop that led to Romero's drug possession charges. Defendant Killens argues that the trial court abused its

discretion and violated his federal constitutional rights to confront witnesses against him, to present a defense, and to due process.[8]

1. Proceedings Below

The prosecution's trial brief included a motion to admit evidence that defendant Singh was found in possession of a .380-caliber gun on March 28, 2014. The prosecution argued that the evidence would show that defendant Singh had disposed of the murder weapon. The prosecution also noted that the incident led to charges against Romero that were dismissed in exchange for his testimony at the preliminary hearing, and that the defense might seek to introduce the incident.

Before Romero testified, defendant Killens noted that Romero was likely to testify that he was scared of defendant Singh after the murders and had stopped hanging around with defendant Singh. Defendant Killens requested the trial court permit him to impeach Romero with evidence that on March 28, 2014, Romero and defendant Singh were together in the back seat of a vehicle that was stopped by police due to an expired registration. Upon smelling marijuana, the police searched the vehicle and found drug paraphernalia, ecstasy, and heroin. The police also found a loaded .380-caliber pistol in defendant Singh's possession.

Defendant Killens argued that the incident would "call[] into some question the veracity" of Romero's claim of being afraid of defendant Singh. The trial court put off ruling on the request.

On cross-examination, Romero acknowledged he was with defendant Singh when he was arrested for "dealing drugs." At that point, the trial court held a hearing outside

[8] In a supplemental opening brief, defendant Killens acknowledges that he did not object in the trial court on these federal constitutional grounds. He contends he is not precluded from raising the constitutional claims on appeal, but he also contends his trial counsel's failure to make those arguments in the trial court constituted ineffective assistance of counsel.

the presence of the jury. Defendant Killens asked the trial court to allow him to "go into everything" about the incident, including the fact that defendant Singh was in possession of a loaded firearm.

Defendant Singh opposed introduction of the March 28, 2014 incident. He argued that his possession of the gun did not prove he had possessed or disposed of another gun on another occasions and that the evidence was more prejudicial than probative.

The prosecutor argued that the March 28, 2014 incident was relevant to show why Romero remained in fear of defendant Singh. Defendant Killens argued that the evidence would impeach Romero's testimony that he was afraid of defendant Singh because it showed that rather than trying to "distance himself" from defendant Singh, he was still "running around committing new criminal activity" with him.

Romero testified outside the presence of the jury, stating that he had initially been unaware that defendant Singh had a gun on March 28, 2014. When the police stopped their vehicle, defendant Singh had become nervous and had asked Romero to hold his gun, pulling it out of his pocket. Romero had not known the gun was loaded. Romero had seen defendant Singh with a gun on numerous prior occasions, but he was surprised that defendant Singh had a gun that day.

In ruling on the admissibility of the March 28, 2014 incident, the trial court noted that it was "considering the impact" to both defendants. The trial court noted that Romero had already been impeached with prior statements and prior testimony, with "deals and dismissals of cases," with the fact that he had received money from the witness relocation program, with felony charges, and with his continued association with defendant Singh following the murders. The trial court found that the March 28, 2014 incident would be prejudicial to defendant Singh but had "insignificant probative value" in terms of impeaching Romero.

2. Applicable Law

"A trial court may restrict defense cross-examination of an adverse witness on the grounds stated in Evidence Code section 352. [Citation.]" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 207 (*Whisenhunt*).) Under Evidence Code section 352, the trial court has discretion to exclude evidence if its probative value would be substantially outweighed by the probability that its admission would require an undue consumption of time or "create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Such rulings are reviewed for abuse of discretion. (*Whisenhunt, supra,* at p. 207.) " '[A] trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted.' [Citation.]" (*Id.* at p. 208.)

3. Analysis

Defendant Killens first argues that the trial court erred by restricting cross-examination of Romero regarding the March 28, 2014 incident on the basis of the prejudice it would pose to defendant Singh.

In his opening brief, defendant Killens relies on *People v. Reeder* (1978) 82 Cal.App.3d 543 (*Reeder*), but we find that case distinguishable. In *Reeder,* the defendant was convicted of selling heroin after a joint trial with a codefendant named Contreras. (*Id.* at p. 547.) Defendant Reeder testified in his own defense and denied taking part in the drug transaction. Defendant Reeder sought to impeach the codefendant with evidence that the codefendant had refused to pay a debt and had previously provided heroin to two of defendant Reeder's relatives, in order to show that defendant Reeder disliked the codefendant so much that he "would *not* have engaged in narcotic dealings" with the codefendant. (*Id.* at pp. 549-550.) The trial court precluded the impeachment, finding its potential for prejudice to the codefendant outweighed its probative value to defendant Reeder. However, the Court of Appeal reversed, reasoning that the evidence was "of

significant probative value" to defendant Reeder (*id.* at p. 553) and that the codefendant could have requested a limiting instruction or moved for a mistrial and a separate trial (*id.* at p. 555).

Unlike in *Reeder,* the excluded evidence in this case did not tend to directly establish defendant Killens's innocence. Instead, the excluded evidence here involved a collateral matter—defendant Singh's possession of a gun on March 28, 2014, when he was in a vehicle with Romero—that did not have "*significant* probative value" to defendant Killens. (*Reeder, supra*, 82 Cal.App.3d at p. 553.) In light of the limited probative value of the impeachment evidence in this case, the trial court did not err by excluding it pursuant to Evidence Code section 352. (See *Reeder, supra,* at p. 553.)

In his reply brief, defendant Killens discusses *People v. Morrison* (2011) 199 Cal.App.4th 158 (*Morrison*), in which the trial court had admitted testimony regarding "a collateral fact" that impeached the defendant's credibility. (*Id.* at p. 165.) The appellate court found that the testimony was relevant and admissible but subject to exclusion pursuant to Evidence Code section 352, and it ultimately upheld the admission of the testimony because the defendant failed to explain why the testimony should have been excluded under Evidence Code section 352. (*Morrison, supra*, 199 Cal.App.4th at p. 165.) Here, the trial court did apply Evidence Code section 352 to exclude the testimony. Moreover, "[a]n appellate court's ruling that a trial court did not abuse its discretion in *admitting* a certain type of evidence is not authority for the proposition that it is an abuse of discretion *to exclude* similar evidence in another case." (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1318.)

Defendant Killens next argues that the trial court erred by finding it was appropriate to restrict cross-examination of Romero regarding the March 28, 2014 incident because Romero had already been impeached by other evidence. Defendant Killens asserts that the other evidence was "garden variety" impeachment material and that impeachment with defendant Singh's possession of a gun during the March 28, 2014

incident would have produced a significantly different impression of Romero's credibility. (See *Whisenhunt, supra,* 44 Cal.4th at p. 208.) Defendant Killens contends that if he had been able to ask Romero about defendant Singh's possession of a gun during the March 28, 2014 incident, the jury would have found that Romero was not actually afraid of defendants after the murders, which would have cast doubt on Romero's testimony implicating defendants as the shooters.

The cases defendant Killens relies on are distinguishable. In *Ortiz v. Yates* (9th Cir. 2012) 704 F.3d 1026, the trial court restricted the defendant from impeaching the "victim and sole eyewitness to the incident" with evidence that she had been threatened into giving certain testimony. (*Id.* at p. 1036.) Without evidence of the threat, the jury "had no reason to question" the victim's motivation for testifying and thus "lacked 'sufficient information to appraise [her] biases and motivations.' [Citation.]" (*Ibid.*) Here, Romero was impeached with evidence that he was testifying in exchange for dismissal of charges, with his prior inconsistent statements, and with evidence that he continued to have contact with defendant Singh after the murders, including during the March 28, 2014 incident that led to drug possession charges. Thus, the jury here had "reason to question" Romero's motivation for testifying and had " 'sufficient information' " to assess his credibility and potential bias. (*Ibid.*) This case is also unlike *U.S. v. Brooke* (9th Cir. 1993) 4 F.3d 1480, in which the excluded impeachment evidence would have shown that the co-defendant might have been "acting on his *own* accord" rather than at the direction of defendant Brooke, which "encompassed the central dispute at trial." (*Id.* at p. 1489.)

In this case, the trial court's restriction on impeachment of Romero was very limited. Defendant Killens was only precluded from eliciting the fact that during the March 28, 2014 incident, Singh had been in possession of a gun. Defendant Killens was able to impeach Romero with other facts of that incident as well as with other evidence having a significant potential impact on Romero's credibility. On this record, the trial

court did not abuse its discretion by finding that the evidence would not have produced "a significantly different impression" of Romero's credibility (see *Whisenhunt, supra,* 44 Cal.4th at p. 208), and there was no violation of defendant Killens's confrontation rights.

D. Admission of Evidence that Killens was on Probation

Defendant Killens contends the trial court erred by admitting evidence that he was on probation at the time his home was searched. He contends the evidence was irrelevant and highly prejudicial, and that its admission violated his due process rights under the Fifth and Fourteenth Amendments.

1. Proceedings Below

In his trial brief, defendant Killens moved to exclude evidence that he was on probation, arguing that the evidence was not relevant and would be unduly prejudicial. He offered to stipulate that his residence was lawfully searched.

During the hearing on motions in limine, the prosecutor argued that the evidence "obtained through that search" was "very probative" and "far outweighed" any prejudicial effect of the jury finding out that defendant Killens was on probation. The prosecutor argued that the jury needed to know "the situation" because it is "highly irregular" to have an officer "come and do a search at somebody's house." Defendant Killens reiterated that he would prefer to "work on a stipulation."

The trial court found that the evidence that defendant Killens had been subject to a probation search was not "unduly prejudicial." The trial court found that the evidence was probative and that in light of the charges defendant Killens was facing, the fact that he was on probation was "de minimis."

During opening statements, the prosecutor told the jury that defendant Killens's connection to the murder was discovered because he was "on probation with search and seizure terms," and his probation officer searched his phone, finding news articles about defendant Singh's arrest and inculpatory text messages and Facebook messages. During

his own opening statement, trial counsel for defendant Killens acknowledged that defendant Killens was on probation for "joy riding in a car that didn't belong to him."

2. Applicable Law

"There is little doubt exposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case and rendering suspect the outcome of the trial. [Citations.]" (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580-1581 (*Harris*).) However, the determination of whether to admit such evidence in a given case "rests in the sound discretion of the trial court. [Citation.]" (*Id.* at p. 1581.) Evidence that a defendant was on probation or parole may have probative value, and the trial court can take measures to reduce the risk of undue prejudice from admission of such evidence. (*People v. Fuiava* (2012) 53 Cal.4th 622, 667 (*Fuiava*) [defendant's prior convictions and parole status admissible to establish his motive for shooting at officers was to avoid arrest for possessing firearms by a felon and for violating his parole].)

3. Analysis

The Attorney General asserts that defendant Killens forfeited this claim by offering to enter a stipulation and by mentioning that defendant Killens was on probation during opening statements. The cases cited by the Attorney General do not support this argument. In *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1058 and *People v. Mickle* (1991) 54 Cal.3d 140, 187, the defendants forfeited their challenges to certain testimony because they failed to object to the testimony. Here, defendant Killens filed an in limine motion objecting to the testimony, and defendant Killens mentioned his probationary status during opening statements only after the prosecution mentioned it first. On this record, we find no forfeiture and thus we proceed to the merits of the claim.

Defendant Killens first argues that his probationary status was not relevant to any disputed issues in the case. (See Evid. Code, § 210.) However, as the prosecutor argued below, if the jury had not learned of defendant Killens's probationary status, the jurors would not have understood why his residence was searched on August 5, 2014 or that it

was a legal search. Moreover, without learning that the search was a probation search, the jurors might have speculated that defendant Killens was already a suspect in the murders based on evidence that was not introduced at trial or that he had committed another crime after the murders.

Defendant Killens cites a number of cases to support his claim that "a defendant's prior criminal record is inadmissible except under narrowly defined circumstances not applicable here." None of those cases involved admission of a defendant's probationary status to explain why a search was conducted, however. In those cases, evidence of the defendant's prior criminal history was not relevant to any issue. (E.g., *People v. Allen* (1978) 77 Cal.App.3d 924, 934 [reference to defendant being on parole improper because parole was for a prior juvenile adjudication, which was inadmissible even for attacking credibility]; *People v. Stinson* (1963) 214 Cal.App.2d 476, 480 [defendant's status as a parolee irrelevant where defendant had admitted prior conviction before trial and court had ordered no mention of conviction at trial]; *People v. Ozuna* (1963) 213 Cal.App.2d 338, 341 [defendant's status as an ex-convict was "patently irrelevant to the issues" and admitted only to show his "debased character and criminal disposition"].)

Here, the trial court reasonably found that the evidence of defendant Killens's probationary status had minimal prejudicial effect that did not substantially outweigh its probative value. The jury would have understood that defendant Killens was not on probation for a crime as serious as the charged offenses, and as previously noted, the evidence ensured the jury would not speculate that there was additional evidence implicating defendant Killens that did not come in at trial or that he had committed another crime after the murders.[9] On this record, the trial court did not abuse its

[9] In his reply brief, defendant Killens asserts, "The speculation problem could have been solved with a jury instruction commanding the jurors not to speculate about this." Defendant Killens has not provided any citation to authority nor shown good cause for failing to raise this argument until the reply brief, and thus we need not consider it.

discretion by failing to exclude the evidence that defendant Killens was on probation at the time his residence was searched. (See *Harris, supra,* 22 Cal.App.4th at p. 1581.)

E. Instruction on Accomplice Testimony

Defendants both claim error with respect to CALCRIM No. 334, the instruction on accomplice testimony. Defendant Killens claims that the instruction violated his Sixth Amendment right to a jury trial in two respects: (1) the instruction placed the burden of proof as to accomplices on the defense rather than the prosecution; and (2) the instruction required only "slight" corroborating evidence. Defendant Singh adopts defendant Killens's arguments.[10]

1. Proceedings Below

Pursuant to CALCRIM No. 334, the jury was instructed: "Before you may consider the testimony of Ronald Saxton or Eric Romero as evidence against Richard Singh and Jordan Killens, you must decide whether Ronald Saxton or Eric Romero were accomplices to the crimes. A person is an accomplice if he is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if, one, he personally committed the crime or, two, he knew of the criminal purpose of the person who committed the crime and, three, he intended to and did in fact aid, facilitate, promote, encourage or instigate the commission of the crime. The burden is on the defendants to prove that it's more likely than not that Ronald Saxton or Eric Romero

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(See *People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2.) Moreover, defendant did not make this assertion in the trial court. (See *ibid.*)

[10] Respondent reads defendant Killens's opening brief as also arguing that the trial court should have instructed the jury that Romero and Saxton were accomplices as a matter of law pursuant to CALCRIM No. 335, instead of instructing the jury that it could find Romero and Saxton were accomplices pursuant to CALCRIM No. 334. Defendant Killens's opening brief contains a section entitled "Saxton and Romero's status as accomplices" but does not argue that the trial court should have given the jury CALCRIM No. 335 rather than CALCRIM No. 334. Thus, we do not address that argument.

were accomplices. An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of the crime, even if he or she knows that a crime will be committed or is being committed and does nothing [to] stop it. A person may be an accomplice if he is not actually . . . prosecuted for the crime. [¶] If you decide that a witness was not an accomplice, then supporting evidence is not required and you should evaluate his or her testimony as you would for that of any other witness. If you decide that a witness was an accomplice, then you may not convict the defendant of murder based on his or her testimony alone. You may use the testimony of an accomplice to convict a defendant only if, one, the accomplice's testimony is supported by other evidence that you believe. Two, that supporting evidence is independent of the accomplice's testimony. And three, that supporting evidence tends to connect the defendant to the commission of the crimes. Supporting evidence however may be slight. It does not need to be enough by itself to prove that the defendant is guilty of the charged crimes. And it does not need to support every fact about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime. The evidence needed to support the testimony of one accomplice cannot be provided by the testimony of another accomplice. Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining [it] with care and caution and in light of all of the other evidence."

2. Applicable Law

Section 1111 provides: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it

merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

" 'The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime. [Citation.]' " (*People v. Abilez* (2007) 41 Cal.4th 472, 505.)

"Whether a person is an accomplice within the meaning of section 1111 presents a factual question for the jury 'unless the evidence permits only a single inference.' [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 635, 679 (*Williams*).) A trial court may instruct the jury that a particular witness is an accomplice if "the facts regarding the witness's criminal culpability are 'clear and undisputed' " but correctly leaves the question for the jury if the evidence of the witness's criminal culpability is "not so clear and undisputed that a single inference could be drawn that [he or she] would be liable for the '*identical offense*[*s*]' charged against [the] defendant." (*Id.* at pp. 679-680.)

It has long been held in California that a criminal defendant has the burden of proving that a witness is an accomplice by a preponderance of the evidence. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 968 (*Tewksbury*).) This is because a witness's status as an accomplice is "a collateral fact which conditions a challenge to the reliability of incriminating evidence," not an element of the charged crime. (*Ibid.*; see also *People v. Frye* (1998) 18 Cal.4th 894, 968 (*Frye*), disapproved of on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and

proved beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*); see also *In re Winship* (1970) 397 U.S. 358, 364 (*Winship*) ["the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"]; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 698 (*Mullaney*) [prosecution also bears the burden of proving, beyond a reasonable doubt, facts pertaining to "the degree of criminal culpability"].)

3. Analysis

According to defendants, CALCRIM No. 334 incorrectly placed the burden of proving accomplice status on the defense rather than the prosecution. Defendants acknowledge that the California Supreme Court has rejected this claim (e.g., *Frye, supra,* 18 Cal.4th at p. 968), but they contend this case law conflicts with the federal constitutional requirement that the prosecution bears the burden of proving a criminal charge beyond a reasonable doubt as set forth in *Winship*, *Mullaney*, and *Apprendi*.

Defendants' contention has already been rejected by our Supreme Court. (*Frye, supra,* 18 Cal.4th at p. 968.) We are required to follow that precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) But even assuming that we had the authority to determine whether the California Supreme Court's precedent is still valid following *Apprendi,* we would reject defendants' arguments.

"*Apprendi* held that every finding that exposes the defendant to punishment, or increases the punishment possible for a crime, must be submitted to a jury and proved beyond a reasonable doubt." (*People v. Anderson* (2009) 47 Cal.4th 92, 116.) Accomplice corroboration does not expose a defendant to additional or increased punishment, however. The punishment for a defendant convicted of a crime is not affected by the fact that he or she was convicted by corroborated testimony from an accomplice or by other evidence (i.e., testimony from a witness or witnesses who were not accomplices). Thus, CALCRIM No. 334 does not violate due process by placing the

burden of proving accomplice status on the defense rather requiring the prosecution to disprove accomplice status beyond a reasonable doubt. In fact, California's requirement of accomplice corroboration adds a requirement that is not required by federal law. (*In re Mitchell P.* (1978) 22 Cal.3d 946, 949; see also *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282 [under federal law, the uncorroborated testimony of an accomplice "is sufficient to sustain a conviction unless it is incredible or insubstantial on its face"].)

Defendants also argue that the "slight" corroborating evidence requirement of CALCRIM No. 334 violates the principles of *Apprendi*. They rely primarily on *People v. Betts* (2005) 34 Cal.4th 1039 (*Betts*), in which the California Supreme Court held that "territorial jurisdiction is a procedural matter that relates to the authority of California courts to adjudicate the case and not to the guilt of the accused or the limit of authorized punishment," such that a defendant has no constitutional right to a jury trial or proof beyond a reasonable doubt on "the factual questions that establish jurisdiction." (*Id.* at p. 1054.)

Defendants assert that the question of whether a witness is an accomplice is not a procedural matter but rather a factual issue that should be subject to proof beyond a reasonable doubt. However, nothing in *Betts* casts doubt on prior California Supreme Court authority holding that a criminal defendant has the burden of proving that a witness is an accomplice by a preponderance of the evidence. (*Frye, supra,* 18 Cal.4th at p. 968; *Tewksbury, supra,* 15 Cal.3d at p. 968.) Even more recently, the California Supreme Court has continued to apply the "slight" corroborating evidence standard. (E.g., *People v. Valdez* (2012) 55 Cal.4th 82, 147-148.) Further, we find nothing in *Apprendi* or its progeny to support defendants' claim that a witness's status as an accomplice is analogous to a "fact that increases the penalty for a crime beyond the prescribed statutory maximum" (*Apprendi, supra,* 530 U.S. at p. 490), a "fact necessary to constitute the

[charged] crime" (*Winship, supra,* 397 U.S. at p. 364), or a fact pertaining to "the degree of criminal culpability" (*Mullaney, supra,* 421 U.S. at p. 698).

In sum, we find no merit to defendants' challenges to CALCRIM No. 334.

F. Prosecutorial Misconduct/Ineffective Assistance of Counsel

Defendant Singh claims the prosecutor committed misconduct on a number of occasions during the trial. He acknowledges that his trial counsel did not object to each instance of prosecutorial misconduct and therefore also claims he received ineffective assistance of counsel. He contends the prosecutorial misconduct and ineffective assistance of counsel violated his rights under the Sixth and Fourteenth Amendments.

1. Applicable Law

"A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence. [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 726 (*Ledesma*).) When the claim of prosecutorial misconduct "is based upon 'comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1001 (*Cunningham*).)

"Under the federal Constitution, to be reversible, a prosecutor's improper comments must ' "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." ' [Citations.] ' "But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citations.]' [Citation.]" (*Cunningham, supra,* 25 Cal.4th at p. 1000.) Such conduct will be found prejudicial if there is a "reasonable probability that the jury would have reached a more favorable result absent the

objectionable comments. [Citation.]" (*People v. Sandoval* (1992) 4 Cal.4th 155, 184 (*Sandoval*); see *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

" '[A] claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury. [Citation.]' [Citation.]" (*People v. Tully* (2012) 54 Cal.4th 952, 1010, fn. omitted.)

"To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel's performance fell below a standard of reasonable competence, and that prejudice resulted. [Citations.] When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.] Even where deficient performance appears, the conviction must be upheld unless the defendant demonstrates prejudice, i.e., [a reasonable probability] that, ' " 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " ' [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694.)

2. Ballistics Testing Argument

Defendant Singh first argues that the prosecutor committed misconduct by misrepresenting testimony by Adam Lutz, the forensic scientist who analyzed the bullets and casings found at the scene of the murders, and by trying to elicit certain testimony from Victor Lurz, the forensic evidence technician who had processed the vehicle found at the scene of the shootings.

a. Proceedings Below

As noted above, Lutz testified that the five bullets and seven casings he had analyzed had likely been fired from the same gun. However, Lutz could not rule out the possibility that there had been two guns because there was a potential eighth bullet strike.

Lutz also testified that it was possible, although "speculative," that the bullet fragment found in Safford's skull was a different type of bullet. Lutz had not analyzed that bullet fragment.

When Lurz testified, the prosecution asked him whether he had sent "some ballistics someplace" at the prosecutor's request. Lurz initially responded that responsibility for sending ballistics evidence to another entity would have fallen on an evidence technician or property technician. Lurz then recalled that at the request of the prosecutor, he had in fact sent "a package or something" to a private crime lab called Forensic Analytical. The prosecutor then asked Lurz to confirm that "the district attorney uses Department of Justice; correct?" After Lurz responded, "For some things, yes," the prosecutor asked Lurz to again confirm that he had "sent this to Forensic Analytical." Lurz replied, "Yes," and again confirmed that he had done so at the prosecutor's request.

During argument to the jury, the prosecutor acknowledged that the ballistics evidence was not "conclusive." The prosecutor then argued that although the five intact bullets Lutz had examined were all .45-caliber "full metal jackets," there was a bullet fragment in Safford's head that could have come from lead bullets. The prosecutor noted, "Possibility." The prosecutor then referred to the bullet found in the trunk of the victims' vehicle, asserting that it "most likely came from a .45[-]caliber lead bullet," not a full metal jacket bullet, which suggested a second shooter had been using a gun with a different type of ammunition. There was no objection to the prosecutor's argument.

Defendant Killens's trial counsel addressed the same issue during his argument to the jury. He noted that the prosecution had "tried to portray the fragment as a lead bullet or a different type of bullet," but pointed out that the prosecution's own witness, Lutz, had characterized that as "speculative." Defendant Killens's trial counsel noted that Lutz had not examined the bullet fragment and asserted that the prosecution had intentionally "chose not to" have Lutz analyze the fragment in order to support the prosecution's argument that the fragment were from a different type of bullet.

In closing argument, the prosecutor responded to the above argument, stating that Lutz had testified the fragment from Safford's head "had no value." The prosecutor also noted that the defense had a right to have the fragment examined also. The prosecutor pointed out that Victor Lurz had testified he sent the ballistics evidence to a forensic laboratory and referenced "their expert." Defendant Killens's trial counsel objected that this was "not correct," and the trial court sustained the objection. The prosecutor asserted, "It is correct that Victor Lurz said he sent it to [F]orensic [L]aboratory." Defendant Killens's trial counsel requested a "front bar," but the trial court said, "I think you can limit it to that." The prosecutor then continued, reiterating that Lurz had sent ballistics evidence to "[F]orensic [L]aboratory" and noting that Lutz did not work for that lab.

b. Analysis

Defendant Singh now contends the prosecutor committed misconduct by (1) attempting to elicit testimony from Lurz regarding sending ballistics evidence to an outside lab; (2) embellishing Lurz's testimony about what was sent to the outside lab; (3) misrepresenting Lutz's testimony about whether two types of ammunition were found; and (4) insinuating that a defense expert had conducted ballistics testing at the outside lab. Defendant contends the prosecutor thereby placed facts not in evidence before the jury.

The Attorney General notes that there was no objection to the prosecutor's questioning of Lurz about sending ballistics evidence to an outside lab, and no objection to the prosecutor's initial argument about there being two different types of bullets. The Attorney General also asserts that defendant Singh is making a different argument on appeal regarding the prosecutor's later assertions about the outside lab. We will reach the merits of each claim, however, in order to address defendant Singh's ineffective assistance of counsel argument.

We agree that the prosecutor should not have attempted to elicit testimony from Lurz to establish that ballistics evidence had been sent to an outside lab, at least to the extent that the jury was likely to have construed that testimony as suggesting that the defense had tested the ballistics fragments and that the testing had not been favorable to the defense. The record does not support the Attorney General's claim that the prosecutor elicited this testimony in order to argue that the defense *could have* had the ballistics evidence tested, and the record does not indicate that either party intended to actually introduce evidence that the ballistics evidence had been tested by a defense expert. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1233-1234; *People v. Earp* (1999) 20 Cal.4th 826, 859-860.)

We also agree—and the Attorney General concedes—that in closing argument, the prosecutor improperly implied that a defense expert ("their expert") worked at the outside lab that received the ballistics evidence. Although the trial court sustained the objection by defendant Killens's trial counsel that this was "not correct," the prosecutor then reiterated that Lurz had sent ballistics evidence to "[F]orensic [L]aboratory" and noted that Lutz did not work for that lab.

However, we do not agree with defendant Singh's claim that the prosecutor committed misconduct by embellishing Lurz's testimony about what was sent to an outside lab. The prosecutor had asked Lurz, who had testified exclusively about bullet strikes and bullets, whether Lurz had "sent some ballistics someplace." Lurz ultimately testified that he had, in fact, sent a package—clearly referring to ballistics evidence—to Forensic Analytical. Thus, when the prosecutor argued that Lurz had sent ballistics evidence to an outside lab, he did not misstate or embellish the evidence.

Although the prosecutor should not have elicited Lurz's testimony about the outside lab and should not have implied that a defense expert worked at that lab, our review of the record demonstrates there is no "reasonable probability that the jury would have reached a more favorable result" absent the improper questioning and argument.

(See *Sandoval*, *supra*, 4 Cal.4th at p. 184; *Watson*, *supra*, 46 Cal.2d at p. 836.) As the Attorney General points out, the ballistics evidence was "circumstantial evidence tending to corroborate the eyewitnesses to the murders." Both Romero and Saxton testified that they saw both defendants with guns and that they saw both defendants shoot the victims. Moreover, the evidence established that both victims were shot three times, in the back of the head and in their backs. This evidence strongly suggested the shootings were committed simultaneously, with two firearms, after the victims had both turned around. As the prosecutor argued at trial, if one victim had been shot first, there would likely have been evidence that the second victim had turned back around to look or had attempted to run away. In light of this evidence, the prosecutor's improper suggestion about possible testing by a defense expert at an outside lab was harmless.

We next consider defendant Singh's claim concerning the prosecutor's comments referring to Lutz's testimony. We do not agree that the prosecutor committed misconduct by asserting that the bullet fragments in Safford's head could have come from lead bullets, because that statement was supported by Lutz's testimony. Lutz testified that the bullet fragments appeared to be lead fragments, and that it was possible, although speculative, that the fragments had not come from full metal jacket bullets.

However, the prosecutor did overstate Lutz's testimony by asserting that the bullet found in the trunk of the victims' vehicle "most likely came from a .45[-]caliber lead bullet," not a full metal jacket bullet. Lutz had testified only that he could not rule out the possibility that there had been two guns because there was a potential eighth bullet strike, not that there "most likely" was a second type of bullet. Nevertheless, defendant Singh's trial counsel was not ineffective for failing to object. The record indicates the defense made a tactical decision to address the prosecutor's assertion during argument to the jury. (See *People v. Welch* (1999) 20 Cal.4th 701, 764 (*Welch*) ["defense counsel could have legitimately decided that it was tactically wise not to interrupt the prosecutor but to respond . . . during his own closing argument, as he in fact did"].)

3. Circumstantial Evidence Argument

Defendant Singh contends the prosecutor committed misconduct by misstating the circumstantial evidence instruction.

a. Proceedings Below

The trial court instructed the jury on circumstantial evidence pursuant to CALCRIM No. 224, which told the jury: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find a defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. Also, before you may rely on circumstantial evidence to find a defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

During argument to the jury, the prosecutor referenced "the circumstantial evidence instruction," asserting, "it's the most reasonable interpretation of the evidence. The most reasonable interpretation." The prosecutor told the jury, "[T]hat's your touch stone. That's your guide post." The prosecutor then discussed the ballistics evidence (as described in the section above) and argued that "[t]he most reasonable interpretation is we had another shooter."

Neither defendant objected, but trial counsel for defendant Singh addressed the prosecutor's discussion of circumstantial evidence during his own argument to the jury: "The law says it's not the most reasonable interpretation. If there is a reasonable interpretation that points towards innocence and one that points towards guilt, you're required to adopt the one that points towards innocence."

b. Analysis

The Attorney General contends the prosecutor did not misstate the law, because the circumstantial evidence rule stated in CALCRIM No. 334 only applies " 'when circumstantial evidence is "substantially relied on for proof of guilt," ' " and the rule does not apply "when circumstantial evidence is merely used to corroborate direct evidence. [Citations.]" (*People v. Sandoval* (2015) 62 Cal.4th 394, 417-418.) The Attorney General points out that here, the prosecution had direct evidence that there were two shooters (i.e., the testimony of Saxton and Romero), and that the ballistics evidence was merely circumstantial evidence corroborating that direct evidence.

Even assuming that the rule stated in CALCRIM No. 334 applied in this case and that the prosecutor misstated the law during argument to the jury, defendant Singh's trial counsel was not ineffective for failing to object. The record shows that defendant Singh's trial counsel made a tactical decision to address the prosecutor's assertion during argument to the jury rather than interrupt the prosecutor's argument with an objection. (See *Welch*, *supra*, 20 Cal.4th at pp. 763-764.) This was a reasonable tactical decision, particularly in light of the trial court's admonition that the jury was required to follow the trial court's instructions—which included CALCRIM No. 334—if the attorneys' comments on the law conflicted with those instructions. (See CALCRIM No. 200.)

4. Motive Argument

Defendant Singh contends the prosecutor committed misconduct with respect to certain text messages. He contends the prosecutor (1) misrepresented facts to the trial court during a motion in limine; (2) told the jury about certain text messages in violation of the in limine ruling; and (3) introduced evidence that violated the in limine ruling.

a. Proceedings Below

The text messages at issue were first referenced in the prosecution's trial brief, which contained a summary of the facts. The factual summary described an incident prior to the murders, in which Navneal and defendant Singh were in a car stopped by

police. After the police found a gun, Navneal told the police the gun belonged to defendant Singh.

The prosecution's trial brief next described events on the day of the murders and indicated that cell phone records would show defendant Singh traveling from Sacramento with Navneal and Safford on the day of the murder. The trial brief stated that during the drive, defendant Singh had called Saxton to say that the planned home invasion robbery "was going down" that day. Defendant Singh had gone to Killens's home and waited for Saxton to pick them up. While waiting, defendant Singh had texted Navneal to "secure a gun to be used in the robbery." The text asked, "What brand is they bruth?" Navneal had texted back, "Slide."

The parties discussed the text messages during a hearing on the motions in limine, which included a motion to exclude all statements by Safford and Navneal. The trial court asked the prosecution if any statements by the victims would be offered. One of the prosecutors responded that Navneal had made statements during the incident when a gun was found in a car. However, since the trial court had indicated that the prior gun incident was not admissible, the prosecutor represented, "[T]hat will not be an issue." The trial court confirmed, "So if that's the only statement that you are proposing as to Navneal Singh, then this motion would be granted." The other prosecutor responded, "Agreed."

During opening statements, one of the prosecutors told the jurors that they would see text messages sent and received on the day of the shootings. According to the prosecutor, defendant Singh had been waiting for a call from Navneal "about the gun" and had sent a text message to Navneal asking, "What brand is they, bro?" Navneal had sent "a response" to defendant Singh.

The text messages themselves were introduced during the testimony of investigator Peter Austen. Austen had created a spreadsheet of cell phone data that included text messages and phone calls exchanged between defendant Singh and Navneal

on the day of the murders. At 5:53 p.m., Navneal had texted defendant Singh, "What brand is they bro?" At 6:02 p.m., defendant Singh had texted Navneal, "Yuup." At 6:10 p.m., Navneal had texted defendant Singh, "Slide." Austen explained that "slide" is a nickname for a semiautomatic weapon. There was no defense objection to the testimony or exhibit.

On cross-examination, Austen was asked about the text messages. He was asked whether the text message saying "Slide" appeared to be a response to a previous text message. Austen testified, "It could be an answer. Because there are telephone calls between the messages. So it could be based on a telephone call that they had and he responded back via text later." He acknowledged that the messages "What brand is they bro" and "Slide" both came from the same person. He also acknowledged that "slide" is commonly used to mean "leave or come."

When the parties later discussed the admissibility of various exhibits, the prosecution indicated it was seeking to admit the actual cell phone records, which the parties had stipulated to, as well as a summary of the records. Trial counsel for defendant Killens objected to the summary, but the trial court ruled the summary was admissible.

During argument to the jury, the prosecutor described the two text messages from Navneal to defendant Singh as "significant." The prosecutor referred to the text message asking "what brand is it bro" and the later text stating "Slide." The prosecutor asked, "So what are they talking about? They're talking about a gun. Navneal has got a gun. He's going to give it to [defendant Singh]." The prosecutor acknowledged that taken alone, the text messages did not "make sense," but reminded the jury that there had been phone calls in between the two messages.

b. Analysis

Defendant Singh asserts the prosecutor violated the trial court's in limine order by eliciting evidence about Navneal's texts, failing to redact Navneal's texts from the spreadsheets, and mentioning the texts in opening statement and argument to the jury.

As the Attorney General points out, however, the trial court's in limine ruling did not encompass Navneal's text messages. The in limine ruling only precluded the prosecution from introducing the statements Navneal had made during the incident when a gun was found in a car. "Although it is misconduct to elicit or attempt to elicit inadmissible evidence in violation of a court ruling [citation]," the trial court had not ruled on the admissibility of the text messages and no objection was raised. (*People v. Silva* (2001) 25 Cal.4th 345, 373.) Thus, prosecutor "violated no court ruling." (*Ibid.*)

Defendant Singh next argues that the prosecutor committed misconduct by indicating, in its trial brief and during opening statements, that defendant Singh had sent the text message asking about the "brand." Defendant Singh points out that the evidence at trial showed the text message referencing a "brand" was actually written by Navneal *to* defendant Singh. As the Attorney General concedes, the prosecutor misspoke. We will assume that even if the misstatements were inadvertent, they constituted " 'prosecutorial error.' " (*People v. Jasso* (2012) 211 Cal.App.4th 1354, 1362 (*Jasso*) ["the rubric of prosecutorial misconduct embraces a prosecutor's inadvertent and negligent objectionable statements to the jury"]; cf. *Fuiava, supra,* 53 Cal.4th at p. 691 [indicating that prosecutorial misconduct does not include "an inadvertent misstatement"].) However, in light of the fact that the evidence showed that Navneal sent the text message, there is no " 'reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " (*Cunningham, supra,* 25 Cal.4th at p. 1001.)

Last, defendant Singh contends the prosecutor asked both the jury and the trial court to "draw an irrational, speculative, and inflammatory inference" from the text messages, apparently because the prosecutor argued that the messages showed that Navneal was going to give defendant Singh a gun. In light of Austen's testimony that "slide" is a nickname for a semiautomatic weapon, the prosecutor's argument was

" 'founded on the evidence in the record and fell within the permissible bounds of argument.' [Citations.]" (*Fuiava, supra,* 53 Cal.4th at p. 692.)

5. Intimidation Argument

Defendant Singh contends the prosecutor committed misconduct by asserting facts not in evidence during argument to the jury: that an associate of defendant Singh's had come to court to intimidate Saxton.

a. Proceedings Below

On cross-examination by the defense, Saxton testified that he had known Quintrel Alexander since middle school. Saxton denied having sold drugs to Alexander. On redirect examination by the prosecution, Saxton acknowledged that while he was testifying, he had seen Alexander come into the courtroom and be "ushered out." Saxton testified that he knew Alexander was a friend of defendant Singh. Saxton also acknowledged that Alexander had passed by him just before his testimony, outside the courtroom. Alexander had stated that he would "stick around now." Saxton testified that because Alexander was a friend of defendant Singh, he "[p]robably" was fearful of Alexander. The prosecutor asked if Saxton knew any reason why Alexander would "come into this courtroom after being told not to by the judge or by his attorney." Saxton said, "I don't know why he came." When the prosecutor next asked Saxton if he believed Alexander had come to court to intimidate Saxton, the defense objected that the question was "leading and speculative," and the trial court sustained the objection. The prosecutor asked Saxton to confirm that Alexander "did come in the courtroom," and Saxton testified, "Yeah." Saxton also agreed when the prosecutor asked, "You've been told to stay out of this courtroom if you're not testifying; is that right?"

During argument to the jury, the prosecutor told the jury that "[t]here was a little bit of commotion" when Alexander had walked into the courtroom during Saxton's testimony, because Alexander was on the witness list and should not have been there. The prosecutor told the jury that Saxton had testified that when he had crossed paths with

Alexander outside of the courtroom, Alexander had stated, "I guess I'll stay and watch this." The prosecutor argued, "That's intimidation. Okay. Coming in here, in violation of a court order for a witness to stay outside, he comes in here while Saxton is testifying. He is a friend of [defendant Singh's]. He was intimidating Mr. Saxton."

b. Analysis

Defendant Singh asserts that there was no evidence in the record to support the prosecutor's comments and questions about (1) Alexander having caused a commotion; (2) Alexander having been on a witness list; (3) Alexander having been told to stay out of the courtroom by the judge; (4) Alexander having been told to stay out of the courtroom by an attorney; (5) Alexander having an attorney; (6) Alexander having violated a court order excluding witnesses from the courtroom; (7) Alexander having come into the courtroom in order to intimidate Saxton; and (8) Alexander having a link to defendants.

As defendant Singh acknowledges and the Attorney General points out, neither defendants' trial counsel objected to the prosecutor's argument or to the prosecutor's questions of Saxton, except for the question about whether Saxton believed Alexander had come to court to intimidate him. Contrary to defendant Singh's assertion, however, the one objection did not preserve a challenge to the prosecutor's earlier questions or to the prosecutor's later argument, since the trial court's sustaining of the "leading and speculative" objection did not indicate that the prosecution was barred from asking further questions about witness intimidation. Because defendant Singh's claims of prosecutorial misconduct were forfeited by his trial counsel's failure to object to the questions and arguments about Alexander, we will consider defendant Singh's claim that he received ineffective assistance of counsel.

First, defendant Singh's trial counsel was not ineffective for failing to object that the prosecution's questions to Saxton were argumentative and put facts not in evidence before the jury. "An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent

that the questioner does not even expect an answer. The question may, indeed, be unanswerable." (*People v. Chatman* (2006) 38 Cal.4th 344, 384 [prosecutor's question—whether " 'the safe [was] lying' "—was argumentative, since "[a]n inanimate object cannot 'lie' "].) In this case, the prosecutor did not ask any argumentative questions of Saxton. Each question anticipated an answer and was answerable; none was "a speech to the jury masquerading as a question." (*Ibid.*) The questions also were based in events that took place during the trial; they did not "suggest[] to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question." (*People v. Wagner* (1975) 13 Cal.3d 612, 619.) Thus, trial counsel could have reasonably decided that an argumentative objection would not have had merit.

Second, defendant Singh's trial counsel was not ineffective for failing to object to the prosecutor's questions of Saxton on the ground that witness intimidation evidence is inadmissible. In general, " ' " 'evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant' " ' " unless the attempt was made in the defendant's presence or the defendant authorized the attempt. (*Williams, supra,* 16 Cal.4th at p. 200.) However, " '[e]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.]' " (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1084 [evidence of threatening statement by defendant's brother admissible to show witness's fear of testifying].) Trial counsel could reasonably have decided that an objection would not have been meritorious, since the prosecutor's questions elicited evidence that was relevant to Saxton's credibility.

Third, defendant Singh's trial counsel was not ineffective for failing to object to the prosecution's argument about Alexander. The record supports the prosecutor's argument that Alexander had been ushered out of the courtroom. Although the jury had not previously learned that Alexander had been on a witness list, that was a reasonable inference from the fact that Alexander had been removed, since the trial court had

excluded witnesses from the courtroom. Trial counsel could reasonably have determined that an objection would have left the jury speculating as to why Alexander had been removed. Trial counsel could also reasonably have believed that an objection to the prosecutor's argument about Alexander's conduct constituting intimidation would not have been meritorious. In light of Saxton's testimony about being afraid of Alexander, the intimidation argument was well within the prosecutor's "wide latitude to vigorously argue his or her case and to make fair comment upon the evidence." (*Ledesma, supra*, 39 Cal.4th at p. 726.)

6. "Lesser Criminals" Argument

Defendant Singh next contends the prosecutor committed misconduct by acting as his own witness and touting the experience of the District Attorney's Office. He complains specifically about the prosecutor's remarks about (1) how there were "lesser criminals" and "lesser players" in the case, (2) how the prosecution did not "use tricks to convict innocent people," (3) how criminals do "stupid things," and (4) how "[p]eople like these" kill to show they are powerful.

a. Proceedings Below

The prosecutor's remarks about "lesser criminals" and "lesser players" came in the context of a discussion about whether the jury should believe Saxton and Romero. The prosecutor acknowledged that both Saxton and Romero had admitted to having previously been untruthful and that both had been granted immunity, which was "leniency." The prosecutor explained that the District Attorney's Office "deals with many criminal situations where in order to get a more serious crime solved we have to give some concessions to lesser criminals. . . . And I think you can understand in this situation how important it was to get these two killers convicted, . . . how we had to give some leniency to lesser players in this case."

The prosecutor's remark about not using "tricks" to get convictions responded to a comment made by defendant Killens's trial counsel during opening statements.

Defendant Killens's trial counsel had told the jury that the use of Facebook posts was "an old favorite DA trick." Referencing this statement, the prosecutor argued, "I think he used the word it's an old DA trick. I may be old, but I don't use tricks to convict innocent people."

The prosecutor's remarks about how criminals do "stupid things" was made in the context of stressing the strength of the evidence. The prosecutor told the jury, "[C]rime is stupid. Criminals are stupid. This isn't Hollywood. This is not TV. This is the real thing. We have these two gentlemen over here who did this horrible crime, and they left a trail of evidence." After noting that defendants had trusted Saxton and Romero "not to tell on them," the prosecutor reiterated, "Crime is stupid. Criminals do stupid things."

The prosecutor's remarks about how "[p]eople like these" kill to show they are powerful came in the context of his argument about motive. The prosecutor noted that in movies and on television, often "there's a nice huge interesting motive" but that in "real life," there are "thrill killings" and crimes committed "without motive." The prosecutor argued, "People like these will kill people for the smallest reason to show that they are powerful. They're the man. They're tough guys. They'll go back and brag about it like Killens did."

b. Analysis

Defendant Singh acknowledges he did not object to any of the above arguments by the prosecutor, and he argues that an objection and admonition to disregard the arguments would not have cured the prejudicial effect. The cases he cites do not support this claim. In *People v. Heldenburg* (1990) 219 Cal.App.3d 468, the defendant did raise an objection to a question asked by the prosecutor, but was found to have forfeited his claim on appeal because his trial counsel failed "to press the trial court for an admonition to the jury." (*Id.* at p. 475.) The defendant failed to object or seek a curative admonition in *People v. Jablonski* (2006) 37 Cal.4th 774, and the court found "not persuasive" his assertion that an objection and request for admonition would have been futile. (*Id.* at p. 836.) The

defendant in *People v. Gaines* (1997) 54 Cal.App.4th 821 made numerous objections to the prosecutor's questions and closing argument. (*Id.* at pp. 824-825.) Likewise, the defendant in *People v. Bolton* (1979) 23 Cal.3d 208 objected to the prosecutor's argument. (*Id.* at p. 212 & fn. 1.) And in *People v. Navarrete* (2010) 181 Cal.App.4th 828, the court held that a curative instruction was ineffective in curing the prejudice stemming from a detective's reference to the defendant's confession, which had been ruled inadmissible. (*Id.* at p. 831.) That court acknowledged that "a trial court can almost always cure the prejudice of an improperly volunteered statement by granting a motion to strike and charging the jury with an appropriate curative instruction," but the reference to the inadmissible confession was an " 'exceptional circumstance' " in which a curative instruction could not undo the prejudice. (*Id.* a p. 836.) The instant case does not involve the " 'exceptional circumstance' " of a defendant's confession being improperly introduced, nor any analogous circumstance. (*Ibid*.) We therefore proceed to determine whether defendant Singh's trial counsel was ineffective for failing to object.

"[I]t is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it. [Citations.] Specifically, a prosecutor's reference to his or her own experience, comparing a defendant's case negatively to others the prosecutor knows about or has tried, is improper. [Citation.] Nor may prosecutors offer their personal opinions when they are based solely on their experience or on other facts outside the record. [Citations.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207.)

The prosecutor did not violate the above standards in this case, and thus defendant Singh's trial counsel was not ineffective for failing to object. The prosecutor did not compare defendants' case negatively to others. (Cf. *People v. Medina* (1995) 11 Cal.4th 694, 758 [improper for prosecutor to tell jury that " 'no case I have ever seen' had such overwhelming evidence"].) The prosecutor also did not " 'attempt to bolster a witness by

reference to facts *outside* the record.' " (*Williams, supra,* 16 Cal.4th at p. 257.) By referring to Saxton and Romero as "lesser criminals" and "lesser players," the prosecutor was arguing the evidence, which showed that Saxton and Romero were not the actual shooters. When the prosecutor asserted that he was not using "tricks" to get convictions, he was simply responding to an argument made by the defense; the comment did not indicate the prosecutor had a personal opinion about defendants' guilt. The prosecutor's remarks about how criminals do "stupid things" was fair comment on the evidence, in light of the fact that there was no apparent motive for the murders and the fact that defendants committed the shootings in plain view of two eyewitnesses, Romero and Saxton. Finally, the prosecutor's remarks about how "[p]eople like these" kill to show they are powerful likewise was fair comment on the evidence, again in light of the fact that there was no other apparent motive for the murders. Defendant Singh's trial counsel could have reasonably decided that any objections to the prosecutor's remarks were not likely to be sustained.

7. In Limine Motion Argument

Defendant Singh contends the prosecutor committed misconduct by misrepresenting facts during the motion in limine regarding the Facebook messages exchanged between defendant Killens and Tran.

As noted in section III.B.1 above, the prosecution originally sought to introduce four Facebook messages that preceded those admitted at trial.[11] However, the prosecutor subsequently told the trial court he was no longer seeking to introduce the first four messages because they were from "another person," not Tran.

[11] The first message was from Tran to defendant Killens: "[H]as he called u back, & your boy rich in tha news." The second message was from defendant Killens to Tran: "Oh yup." The third message was from defendant Killens to Tran: "[S]end me the link." The fourth message was from Tran to Killens: "[T]hey caught him on the 2 murders or some shit."

Neither defense counsel objected when the prosecutor originally attributed the Facebook messages to Tran. Defendant Singh fails to explain why an objection would have been futile or how this issue presents a pure question of law. Therefore, defendant Singh's claim of prosecutorial misconduct is waived. Defendant Singh does not claim that his trial counsel was ineffective for failing to object.

Moreover, defendant Singh acknowledges that an objection would not have made a difference in the trial court's analysis because before the trial court even ruled on the admissibility of the messages, the prosecutor acknowledged that the messages were not from Tran. The messages were also not introduced at trial. Even if properly preserved, we would decline to find " 'prosecutorial error' " under these circumstances (see *Jasso, supra,* 211 Cal.App.4th at p. 1362), and certainly no prejudicial prosecutorial misconduct (see *Cunningham, supra,* 25 Cal.4th at p. 1019.)

8. Federal Due Process Claim

Defendant Singh contends the prosecutorial misconduct in this case "so infect[ed] the trial with unfairness" that his convictions were a denial of due process. Defendant Singh asserts that the record shows the prosecutor "did whatever was necessary to gain favorable rulings from the court and to bias the jury against the defendants."

The record does not support defendant Singh's description of the prosecution's efforts to obtain convictions in this case. As we have detailed, defendant Singh's individual claims of prosecutorial misconduct are without merit or were not prejudicial. With respect to the ballistics evidence, the prosecutor's improper questions and comments about testing at an outside lab was harmless in light of the other evidence establishing that both defendants shot the victims. Even if the prosecutor misstated the accomplice testimony instruction, it was not reasonably probable that the jury would have misunderstood the law of accomplice testimony in light of the trial court's instructions and defense arguments. Similarly, although the prosecutor initially attributed a text message to defendant Singh, the evidence showed that Navneal actually sent the text

message and thus it was not reasonably probable that the jury would have believed the message was sent by defendant Singh. There was no prosecutorial misconduct with respect to the prosecutor's questions and arguments concerning Alexander, and no prosecutorial misconduct with respect to the prosecutor's arguments about "lesser criminals," "tricks," the "stupid things" criminals do, and how "[p]eople like these" kill to show they are powerful. Finally, the prosecutor corrected his initial representation about the Facebook messages, which in any event did not affect the trial court's ruling and did not go before the jury.

In sum, this is not a case in which the prosecutor committed errors that " ' "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." ' [Citations.]" (*Cunningham, supra,* 25 Cal.4th at p. 1000.)

G. Cumulative Prejudice

Both defendants contend that even if no one of the alleged trial errors was prejudicial, there was cumulative prejudice. (See *Hill, supra,* 17 Cal.4th at p. 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].) Although we have noted a few instances of prosecutorial error, we found no prejudice from the individual instances, and we find no prejudice from the cumulative effect of those prosecutorial errors. Having found no other trial errors, there can be no cumulative prejudice.

H. Section 12022.53 Allegations

As noted above, the second amended information alleged that each defendant personally used and intentionally discharged a firearm and proximately caused great bodily injury or death, with references to section 12022.53, subdivisions (b), (c), (d), and (e). The verdict forms reflected that the jury found true allegations that each defendant personally and intentionally discharged a firearm under section 12022.53, subdivision (c) and allegations that each defendant personally and intentionally discharged a firearm, causing great bodily injury and death, "within the meaning of

Penal Code Sections 12022.53(d) and 12022.53(e)." Both defendants were sentenced to life without the possibility of parole for the murders with consecutive terms of 25 years to life for the section 12022.53, subdivision (e) allegations. The trial court imposed terms of 20 years for the section 12022.53, subdivision (c) allegations and terms of 25 years to life for the section 12022.53, subdivision (d) allegations, but stayed those terms.

We requested the parties submit supplemental briefs addressing whether the trial court err by imposing enhancements under section 12022.53, subdivision (e) and if so, what remedy this court should order to correct the errors. Defendants responded by asserting that the prosecution failed to plead and prove not only the facts required for the section 12022.53, subdivision (e) enhancement, but also for the section 12022.53, subdivision (d) enhancement. The Attorney General's response conceded both errors and agreed with defendants that the proper remedy is to remand for resentencing and order the trial court to strike those two enhancements and impose the section 12022.53, subdivision (c) enhancement.

1. Applicable Law

Section 12022.53, subdivision (b) provides for a 10-year enhancement when a person "personally uses a firearm" in the commission of a specified felony.

Section 12022.53, subdivision (c) provides for a 20-year enhancement when a person "personally and intentionally discharges a firearm" in the commission of a specified felony.

Section 12022.53, subdivision (d) provides for an enhancement of 25 years to life when a person "personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice" in the commission of a specified felony.

Section 12022.53, subdivision (e) provides for an enhancement of 25 years to life when a person is "a principal in the commission of an offense," the person violates section 186.22, subdivision (b)—that is, he or she commits an offense for the benefit of a

criminal street gang, and "[a]ny principal in the offense committed any act specified in subdivision (b), (c), or (d)."

Section 12022.53, subdivision (j) specifies that for any of the above penalties to apply, "the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

2. Analysis

In this case, although section 12022.53, subdivision (e) was referenced in the charging document, the prosecution never actually alleged the factual basis for a section 12022.53, subdivision (e) enhancement. In particular, there was no allegation that any offense was committed for the benefit of a criminal street gang in violation of section 186.22, subdivision (b). The jury was not instructed on such an allegation, and although the verdict forms referenced section 12022.53, subdivision (e), they did not contain the relevant statutory language and thus the jury made no findings under that statute. The section 12022.53, subdivision (e) enhancement must, therefore, be stricken. (See *People v. Botello* (2010) 183 Cal.App.4th 1014, 1021, 1029 [striking § 12022.53, subd. (e) enhancement because it was not alleged in the information and not included in the verdict forms].)

The charging document also did not fully allege the factual basis for the section 12022.53, subdivision (d) enhancements. In particular, there was no allegation that either defendant had proximately caused great bodily injury or death to a person "other than an accomplice." (*Ibid*.) The jury instructions did not inform the jury that proof of the allegation required a finding that the victim was a person other than an accomplice, and the verdict forms did not require the jury to make such a finding. In light of section 12022.53, subdivision (j)'s requirement that "the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading and

either admitted by the defendant in open court or found to be true by the trier of fact," we agree that the section 12022.53, subdivision (d) enhancement must be stricken.

IV. DISPOSITION

The judgment is reversed and the matter is remanded for resentencing. On remand, the trial court shall strike the enhancements imposed pursuant to Penal Code section 12022.53, subdivision (d) and Penal Code section 12022.53, subdivision (e) and impose the previously stayed enhancements pursuant to Penal Code section 12022.53, subdivision (c).

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

_____
ELIA, ACTING P.J.

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MIHARA, J.